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The Power of the Bankruptcy Court to Enjoin Creditor Claims Against Nondebtor Parties in Light of 11 U.S.C. § 524(e): In re Dow Corning Corp.

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I. INTRODUCTION

The litigation surrounding claims against Dow Corning Corporation, manufacturer of silicone-gel breast implants, may finally come to an end.[1] Dow Corning, a subsidiary of Dow Chemical Company and Corning Glass, Inc., produced silicone-gel products for nearly three decades.[2] Allegations that implants caused auto-immune disorders began a flood of litigation against Dow Corning.[3] After an unexpected rush of new claimants, a proposed $4.255 billion settlement fell apart.[4] Dow Corning then filed for Chapter 11 bankruptcy and sought a reorganization plan that would bring finality to the litigation.[5] Eventually, the bankruptcy court approved a reorganization plan that was affirmed by the U.S. Court of Appeals for the Sixth Circuit.[6]

Usually, a bankruptcy court in a Chapter 11 bankruptcy proceeding may stay litigation against the debtor to allow the debtor

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1. *In re* Dow Corning Corp., 280 F.3d 648 (6th Cir. 2002). For a summary of recent academic work in the area of discharges under § 524(e), see Andrew Goldman & Jorian Rose, *Litigation, Third Party Releases, D&O Claims, and Subordination of Securities Law Claims*, 846 PUB. L. INST. 523 (2003); Sally S. Neely, *The Continuing Debate Re: Non-debtor Releases/Permanent Injunctions in Chapter 11*, WL SH054 A.L.I.-A.B.A. 385 (2003); Sally S. Neely, *The Continuing Debate Re: Non-debtor Releases/Permanent Injunctions in Chapter 11*, WL SG108 A.L.I.-A.B.A. 485 (2002); Sally S. Neely, *The Continuing Debate Re: Non-debtor Releases/Permanent Injunctions in Chapter 11*, WL SG001 A.L.I.-A.B.A. 689 (2001); Jeffery W. Warren, *Requirements for the Approval of Third-Party Non-debtor Releases*, AM. BANKR. INST. J., Apr. 2003, at 34; Jeffrey W. Warren, *Jurisdiction to Enjoin Claims of Third Parties: Correcting a Flawed Analysis*, AM. BANKR. INST. J., May 2000, at 12.

2. *Dow Corning Corp.*, 280 F.3d at 653.

3. *Id.*

4. *Id.*

5. *Id.* at 654.

6. *Id.* at 655–56, 663.

to reorganize or liquidate.[7] In addition to staying litigation against Dow Corning, however, the plan approved by the bankruptcy court included two potentially problematic provisions as a quid pro quo for sizeable monetary contributions to the fund. These provisions released Dow Corning's insurers and shareholders from further liability on personal injury claims *and* permanently enjoined parties from bringing action against Dow Corning's insurers, shareholders, or subsidiaries once the creditors' claims were satisfied as against Dow Corning.[8] Generally, in a Chapter 11 proceeding, the bankruptcy court has authority to decide issues between debtors and creditors, but not claims between creditors and nondebtor third parties. Because of the unusual circumstances in this case—the large number of tort claims and the potential for indemnification that would nullify any settlement with Dow Corning—the bankruptcy court exercised unusual authority to enjoin creditor claims against specific nondebtor parties.

A potential impact of the Sixth Circuit's recent decision is that it may allow a bankruptcy court to have virtually unlimited power to release claims in future mass tort litigation. Although not explicitly provided in the language of the Bankruptcy Code (hereinafter, "the Code"), a bankruptcy court is endowed with broad equitable power under 11 U.S.C. § 105 to effectuate a successful reorganization plan for the debtor. This equitable power may be used to enjoin suits by creditors against nondebtor third parties, but should be used only in

7. A "debtor" in a Chapter 11 case is the person or business seeking the protection of the bankruptcy court under Chapter 11 of the Bankruptcy Code. A filing of Chapter 11 in the bankruptcy court will immediately and automatically stay all litigation pending against the debtor and the debtor's property, while the debtor attempts to reorganize, rehabilitate, or liquidate itself. Long-term relief from creditors comes from reorganization or orderly debtor-controlled liquidation. The business may continue to function in present or revised form and "its present creditors will be permitted to satisfy their claims only as provided in the debtor's plan of reorganization." JOHN H. WILLIAMSON, THE ATTORNEY'S HANDBOOK ON SMALL BUSINESS REORGANIZATION UNDER CHAPTER 11, at 1:2 (3d ed. 1992).

8. *In re* Dow Corning Corp., 244 B.R. 721, 735–36 (Bankr. E.D. Mich. 1999). The reorganization plan provided that "all Persons who have held, hold, or may hold Products Liability Claims, whether known or unknown, shall be deemed to have forever waived and released all such rights or Claims" against the released parties. *Id.* at 735. The released parties "are the Debtor and its shareholders, The Dow Chemical Company and Corning, Inc." *Id.* at 736. The reorganization plan further provided that "all Persons who have held, hold, or may hold Released Claims, whether known or unknown, . . . shall be permanently enjoined" from pursuing those claims against the released parties. *Id.*

the unusual circumstances accompanying mass tort or complex litigation proceedings.

This Note concludes that a bankruptcy court does have broad equitable power that is not limited by 11 U.S.C. § 524(e)[9] to issue third-party injunctions in favor of nondebtor parties. The Sixth Circuit's reasoning correctly limits a bankruptcy court's power through its use of an "unusual circumstances" test. Part II reviews the purpose and history of § 524(e) and subsequent court rulings interpreting this section. Part III introduces the attitude of the Sixth Circuit's consideration of *In re Dow Corning* and the argument that broad equitable powers and unusual circumstances justify the release and injunction of claims. Part IV concludes that the Sixth Circuit correctly analyzed the Dow Corning problem and provided a useful framework for resolving future mass tort litigation in the bankruptcy court. Part V offers a brief conclusion.

II. BACKGROUND: THE LIMITATIONS ON A BANKRUPTCY COURT'S POWER

A bankruptcy court has considerable discretion in structuring debtor reorganization and providing for maximum creditor satisfaction. Bankruptcy courts rely on provisions of the Code that grant bankruptcy courts the authority to control debtors' attempts to reorganize or liquidate assets and satisfy creditor demands. For example, all federal circuit courts of appeal recognize that § 105 grants bankruptcy courts broad equitable powers to effectuate solutions that are "necessary" or "appropriate" and comply with other sections of the Code.[10]

From its plain language, § 105 only functions to enforce other provisions of the Code.[11] Thus, bankruptcy courts cannot exercise § 105 power in situations where it is deemed inconsistent with another

9. 11 U.S.C. § 524(e) (2000) ("Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."). Section 524(e) has been read to disallow the bankruptcy court from enjoining creditor claims against nondebtor parties. *See, e.g.*, *In re* Am. Hardwoods, Inc., 885 F.2d 621 (9th Cir. 1989).

10. 11 U.S.C. § 105(a). A bankruptcy court has the power to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *Id.*; *see, e.g.*, *In re* A.H. Robins Co., 880 F.2d 694, 701 (4th Cir. 1989).

11. 11. U.S.C. § 105(a).

provision of the Code.[12] Even if a provision in the statute is not facially inconsistent, a reorganization plan must be either "necessary" or "appropriate" for § 105 to give adequate authority to enjoin third-party nondebtors.[13] So, if the use of § 105 is inconsistent with other provisions of the Code or if the § 105 power is neither necessary nor appropriate for the reorganization, then bankruptcy courts will not have the requisite statutory power to enjoin claims in favor of nondebtor parties.[14]

Does a bankruptcy court's statutory grant of authority in § 105(a) extend to situations involving persons or entities that are involved in the litigation, but which are not debtors in bankruptcy? The Code does contain provisions that allow injunctions of claims between creditors and debtors, without which, the claims might prevent or adversely affect an otherwise successful reorganization.[15] However, the Code contains no express grant of authority that allows a bankruptcy court to enjoin claims against nondebtor third parties, even if the reorganization might be affected.

The circuit courts are split as to whether § 524(e) serves as a restraint on the broad equitable powers of bankruptcy courts.[16] Section 524 may prohibit an injunction affecting third parties depending on a court's interpretation of the provision: "Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."[17] If § 524 is inconsistent with permanent injunctions, then any authority granted the bankruptcy court under § 105 cannot be used to enjoin claims against nondebtor parties. However, if § 524 simply concerns the normal results of a bankruptcy case, then it does not necessarily prohibit different results under unusual circumstances.

As discussed below, some circuits have recognized and welcomed the broad equitable powers granted to the bankruptcy courts by the 1978 Code. The Second, Fourth, and D.C. Circuits have each affirmed bankruptcy plans that allowed third-party releases. The Ninth and Tenth Circuits, however, have held that nonconsensual,

12. *Id.*
13. *Id.*
14. *Id.*
15. *See, e.g.*, *id.* §§ 362(h), 524(f), (h).
16. *See, e.g.*, *In re* Am. Hardwoods, Inc., 885 F.2d 621 (9th Cir. 1989).
17. 11 U.S.C. § 524(e).

third-party releases are expressly against the policies of the Code. Alternatively, the Fifth Circuit and the Seventh Circuit have conceived of situations where a temporary injunction, rather than a permanent injunction, of claims against third parties might be permissible, but neither circuit has yet examined a case where the debtor's circumstances demanded that sort of relief. Similarly, the Third Circuit has not enjoined third-party claims, but it has discussed the special considerations that might warrant an injunction of claims against third parties.

A. The Second, Fourth, and D.C. Circuits: Allowing Permanent Injunctions of Claims Against Nondebtor Parties

The Second, Fourth, and D.C. Circuits have allowed bankruptcy courts to enjoin claims against nondebtor parties.[18] As most eloquently stated in a bankruptcy court decision, each of these circuit courts has held that § 524(e) does not present a significant limitation on the broad equitable powers of the bankruptcy court.[19] Section 105 endows a bankruptcy court with broad equitable powers to issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[20] Furthermore, a bankruptcy court should use its equitable powers to conserve judicial resources and save litigation costs by limiting the litigation and negotiation processes.[21] Because a bankruptcy court wishes to provide the

18. *See, e.g.*, MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 91 (2d Cir. 1988); *In re* A.H. Robins Co., 880 F.2d 694 (4th Cir. 1989); *In re* AOV Indus., Inc., 792 F.2d 1140, 1145 (D.C. Cir. 1986).

19. *See In re* Heron, Burchette, Ruckert & Rothwell, 148 B.R. 660, 687 (Bankr. D.C. 1992) ("This section [§ 524(e)] is merely declarative of the effect of a discharge under § 524. It does not affect the ability of the court to issue a permanent injunction under § 105(a) that affects the liability of a non-debtor on the debtor's debt. Such an injunction exists apart from a discharge under § 524. Section 524(e) contains no language of prohibition and should not be interpreted to limit the court's power under § 105(a).").

20. 11 U.S.C. § 105(a); *see, e.g.*, *A.H. Robins*, 880 F.2d at 701. "[S]ection 105(a) empowers bankruptcy courts to grant permanent injunctions not only against actions asserting claims *directly* against plan contributors, but 'incidental' injunctions protecting plan contributors from *indirect claims* for indemnification and contribution, at least where such protection is deemed 'essential' to the success of a reorganization plan." Monarch Life Ins. Co. v. Ropes & Grey, 65 F.3d 973, 982 (1st Cir. 1995) (summarizing other circuit opinions about whether § 105 granted the bankruptcy court sufficient power to enjoin third-party claims).

21. *A.H. Robins*, 880 F.2d at 701; *Johns-Manville*, 837 F.2d at 91. The Second Circuit was the first court to rule that a bankruptcy court may issue an equitable release of third-party claims. Debtor Johns-Manville Corporation proposed a reorganization plan that would enjoin future products liability suits against the insurers of settled policy claims. The Second Circuit

greatest satisfaction to creditors, it has no incentive to prolong the litigation and risk decreasing the size of the fund to satisfy creditors.[22] None of these circuit courts held that the language of § 524(e) prohibited a bankruptcy court's release or injunction of third-party liability so long as the enjoining of claims was essential to effectuate the reorganization plan.[23]

Apart from the equitable power granted by the Code, a release or injunction granted in favor of a nondebtor party is given as consideration for a substantial contribution to the debtor's reorganization plan. The funding that facilitates the plan is given as a quid pro quo for a discharge of nondebtor liability to creditors. "Thus, at a functional level the nondebtors are not receiving a discharge of their obligations to the creditors; they are merely exchanging one obligation for another. The exercise of the court's power under § 105(a) to issue an injunction therefore is not inconsistent with § 524(e)."[24]

The most recent case in the Second Circuit, *In re Drexel Burnham*, involved complex litigation that was put on hold for a Chapter 11 bankruptcy proceeding.[25] This decision built on the foundation laid in the Second Circuit by *MacArthur Co. v. Johns-Manville Corp.*[26] In *Drexel*, the court allowed the debtor to present a plan that called for an injunction of suits against third parties.[27] Relying on the policy of finality in litigation and bankruptcy

relied primarily on the policies of bankruptcy law to uphold the bankruptcy court's order granting the release. The court reasoned that the plan was permissible under the "equitable and statutory powers to dispose of the debtor's property free and clear of third-party interests." *Id.* The court found that the "injunctive orders issued by the Bankruptcy Court were necessary" to carry out the plan. *Id.* at 93. The court based this authority to issue an equitable injunction on its authority to "dispose of assets free and clear and to channel claims to the proceeds." *Id.*

22. *In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 293 (2d Cir. 1992).

23. *See, e.g.*, *A.H. Robins*, 880 F.2d at 702; *Drexel Burnham*, 960 F.2d at 293 ("In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan. . . . [T]he injunction is a key component of the Settlement Agreement.").

24. *Heron*, 148 B.R. at 687. A bankruptcy court in the D.C. Circuit had laid the groundwork for its analysis of third-party consideration in return for the favorable injunction. Although ruling in a 1986 case that a violation of § 524(e) by a third-party injunction was moot, the court added in dictum that a bankruptcy court's rulings "may have tangential effects" on third parties. *In re* AOV Indus., Inc., 792 F.2d 1140, 1145 (D.C. Cir. 1986).

25. *Drexel Burnham*, 960 F.2d at 288.

26. *Id.* at 285; *see Johns-Manville*, 837 F.3d at 93.

27. *Drexel Burnham*, 960 F.2d at 285.

reorganization, the Second Circuit determined that reasonableness, fairness, and adequacy of the proposed settlement and negotiation mandated that the court use its power to enjoin suits against third parties.[28] The court further held that if an injunction were not issued, third parties would not be as willing to contribute to the debtor's settlement and the plan may not be approved as easily.[29] Furthermore, third parties who do not contribute and receive a release likely would be subject to future litigation, further postponing a final resolution of claims.

Similar to the Second Circuit, the principal case from the Fourth Circuit set forth a test to determine when a bankruptcy court might be able to enjoin third-party claims to the bankruptcy.[30] *In re A.H. Robins Co.* involved over 195,000 personal injury claims.[31] The circuit court determined that any attempt by the bankruptcy court to evaluate each claim would lead to inevitable and intolerable delay in settlement.[32] Furthermore, if the court tried each claim separately, there would not be a completely equitable division among the creditors and none of the debtor's assets would remain.[33] The court decided that in the interest of substantial justice to both the creditors and the debtor, it should discharge the liability of the third-party guarantor.[34]

The court set forth a three-prong test to support its holding in favor of a discharge in extraordinary circumstances.[35] First, the reorganization plan must be "overwhelmingly approved" by the voting creditors.[36] Second, the plan must give a second chance to late claimants.[37] Third, the whole of the reorganization plan must

28. *Id.* at 293.

29. *Id.*

30. *In re* A.H. Robins Co., 880 F.2d 694 (4th Cir. 1989).

31. *Id.* at 697.

32. *Id.* at 697–98.

33. *Id.* at 697.

34. *Id.* at 702.

35. *Id.* at 698.

36. *Id.* In fact, although the plan was approved by 94.38% of the voting creditors, only 71.6% of the creditors voted. *Id.* at 697–98. Most notably absent from that group were the creditors that had the greatest interest in pursuing claims. However, the circuit court was not persuaded by the fact that 5.62% of the actual votes came from claimants with the largest claims. *Id.* at 698 n.3.

37. *Id.* at 702.

hinge on the debtor being free from indirect claims.[38] Since all three criteria were met, the Fourth Circuit held that the bankruptcy court could exercise its equitable power to enjoin the suits against parties that had contribution claims against the debtor.[39]

B. The Ninth and Tenth Circuits: Disallowing the Enjoining of Claims Against Nondebtor Parties

The principal cases of the Ninth and Tenth Circuits have held that the broad equitable powers outlined in § 105(a) are curtailed by § 524(e). The Ninth Circuit's decision in *In re American Hardwoods, Inc.*,[40] led the way for the prohibitive interpretation of § 524(e). The Ninth Circuit directly confronted the question of whether a "bankruptcy court [had] jurisdiction and power to enjoin permanently, beyond confirmation of a reorganization plan, a creditor from enforcing a state court judgment against nondebtors."[41] The court concluded "that the specific provisions of section 524 displace the [bankruptcy] court's equitable powers under section 105 to order the permanent relief sought by [the petitioner in bankruptcy]."[42]

When American, the petitioner in bankruptcy, initially filed bankruptcy, the bankruptcy court temporarily enjoined a creditor, Deutsche, from enforcing any judgment against the president and vice president of American.[43] After the case had been argued in the bankruptcy court, the court denied a motion for a permanent injunction.[44] Subsequently, the court of appeals held that § 524(e) limits the bankruptcy court's equitable power under § 105 so that the bankruptcy court may not discharge the liabilities of

38. *Id.*

39. *Id.*

40. *In re* Am. Hardwoods, Inc., 885 F.2d 621 (9th Cir. 1989).

41. *Id.* at 623. American Hardwoods used large machinery financed by Deutche Credit Corporation. The president and vice president of American, Mr. and Mrs. Keeler, respectively, purchased the equipment and then transferred title to American. Deutche obtained an order to seize American's machinery and American filed for Chapter 11 bankruptcy. The Keelers were "nondebtor guarantors of American's liabilities to Deutsche." *Id.* at 622. However, in the bankruptcy reorganization where the Keelers sought a release from liability from American's creditors, the Keelers did not contribute any assets to the bankruptcy estate. *Id.*

42. *Id.* at 626 ("Section 524(e), therefore, limits the court's equitable power under section 105 to order the discharge of the liabilities of nondebtors.").

43. *Id.* at 622.

44. *Id.*

nondebtors.[45] The court of appeals ruled that "[a] discharge under section 524(a)(2) does not void *ab initio* a liability. Rather, section 524 constructs a legal bar to its recovery. A discharge is, in effect, a special type of permanent injunction."[46] The Ninth Circuit cited other examples where the powers of the bankruptcy court under § 105 were curtailed. Specifically, a bankruptcy court does not have the authority to award attorneys fees, "order a trustee to recover expenses in a manner not specifically provided for in 11 U.S.C. § 506(c)," or enjoin the assessment or collection of taxes.[47] The circuit court reasoned that these other limitations on a bankruptcy court's equitable powers indicated that § 524(e) was also a limit on those powers.[48]

After holding that § 524(e) disallowed the enjoining of third parties, the court added an interesting dictum[49] that examined the facts in light of the result of the *Robins* case in the Fourth Circuit.[50]

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45. *Id.* at 626 (defining a discharge as "a special type of permanent injunction" and quoting the § 524(a)(2) definition of the effect of a discharge "as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived").

46. *Id.*

47. *Id.* at 625.

48. *Id.*

49. *In re* Lowenschuss, 67 F.3d 1394, 1402 (9th Cir. 1995) ("Lowenschuss ignores the clear language of *American Hardwoods*, where we expressly declined to adopt the approach set forth in *In re A.H. Robins*; we stated, in *dictum*, '[e]ven if we adopted *In re A.H. Robins Co.* . . . , it would not dictate a different result.'" (quoting *Am. Hardwoods*, 885 F.2d at 626)).

50. *Am. Hardwoods*, 885 F.2d at 626. The Ninth Circuit set forth the Fourth Circuit's test differently than did the *Robins* court. The Ninth Circuit said the test required a finding that

> (1) the reorganization plan, which included the injunction, was approved by over 94% of the claimants, (2) the plan provided for full payment of creditors' claims, (3) the injunction affected only about 1.5% of claimants, (4) it was 'essential' to the plan that claimants 'either resort to the source of funds for them in the Plan . . . or not be permitted to interfere with the reorganization and thus with all other creditors,' and (5) 'the entire reorganization hing[ed] on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor.'

Id. (citing *In re* A.H. Robins Co., 880 F.2d 694, 698, 700–01 & n.7, 702 (4th Cir. 1989)). The Fourth Circuit's "test" was simply a limitation of the injunction of third parties to the facts of the case.

> In this situation where the Plan was overwhelmingly approved, where the Plan in conjunction with insurance policies provided as a part of a plan of reorganization gives a second chance for even late claimants to recover where, nevertheless, some have chosen not to take part in the settlement in order to retain rights to sue certain

The dictum implicitly suggests that *Robins* allows an injunction because it dealt with mass tort claims; the court distinguished *Robins* on the facts, noting that whereas the Fourth Circuit was dealing with 195,000 litigants, *American Hardwoods* only dealt with a handful of affected parties.[51] Subsequent cases in the Ninth Circuit have also affirmed the position that a bankruptcy court does not have the authority to discharge third parties from their liability.[52] In one subsequent case, the Ninth Circuit noted that a recent amendment to § 524(g) shows that a bankruptcy court is not permitted to release claims against nondebtors.[53] This new provision, added in the 1994 Bankruptcy Reform Act, lists a series of conditions for discharging liability in asbestos cases.[54] The court concluded that this explicit authority to enjoin claims in asbestos cases is evidence that "§ 524(e) denies such authority in other, non-asbestos, cases."[55]

> other parties, and where the entire reorganization hinges on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor, we do not construe § 524(e) so that it limits the equitable power of the bankruptcy court to enjoin the questioned suits. We leave questions concerning cases in which § 524(e) does apply for another day.

A.H. Robins, 880 F.2d at 702.

51. In view of its own interpretation of the test set forth in *Robins*, *see supra* note 50, the court held that

> the permanent injunction sought by American was not overwhelmingly approved by creditors; the injunctions would affect American's most significant creditor, not merely 1.5% of its creditors; and American does not argue, nor did the district court find, that the permanent injunction is "essential to the plan" or that the entire reorganization "hinged" on it.

Am. Hardwoods, 885 F.2d at 627.

52. *See, e.g.*, *In re* Lowenschuss, 67 F.3d 1394 (9th Cir. 1994). Resorts International, Inc. filed an amended complaint against Fred Lowenschuss, but before the litigation could get underway, Resorts filed for Chapter 11 bankruptcy in New Jersey. Lowenschuss subsequently filed Chapter 11 bankruptcy in Nevada that stayed the action against him in New Jersey. In the proposed Plan, Lowenschuss included a "Global Release" provision for actions against himself and his estate. Although the bankruptcy court approved the reorganization, the U.S. District Court for the District of Nevada vacated the provision. The Ninth Circuit affirmed the district court. *Id.* at 1396–97.

53. *Id.* at 1401–02 & n.6.

54. "Nothing in subsection (a) [which became § 524(g)], or in the amendments made by subsection (a), shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization." Bankruptcy Reform Act of 1994, Pnb. L. No. 103-394, § 111(b), 108 Stat. 4117 (1994).

55. *Lowenschuss*, 67 F.3d at 1402 n.6.

> The stated goal of Congress in enacting § 524(g) was to provide absolute certitude for the channeling injunctions entered in connection with chapter 11 reorganization proceedings with future personal injury claims against the debtor based on exposure

The Tenth Circuit followed the reasoning of *American Hardwoods* in *In re Western Real Estate Fund, Inc.*[56] This case involved a contract dispute over legal fees and a bankruptcy proceeding that stayed the lawyer's claim against the primary creditor.[57] The Tenth Circuit allowed the bankruptcy court to issue a temporary stay in litigation with third parties. This temporary stay would only be permissible if it occurred during the time of the reorganization and if it did not become a permanent injunction which relieved the third party of liability to the creditor.[58] The court reasoned that "it is the debtor, who has invoked and submitted to the bankruptcy process, that is entitled to its protections; Congress did not intend to extend such benefits to third-party bystanders."[59]

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to asbestos-containing products. Such channeling injunctions had been entered in the *Johns-Manville* case and the *UNR* case. However, lingering uncertainty existed in the financial community as to whether the injunctions entered in those cases could withstand all challenges.

Jeffrey W. Warren, *Jurisdiction to Enjoin Claims of Third Parties*, 19 AM. BANKR. INST. J., May 2000, at 12, *available at* 2000 ABI JNL. LEXIS 50.

56. *In re* W. Real Estate Fund, Inc., 922 F.2d 592, 601–02 (10th Cir. 1990), *modified sub nom.* Abel v. West, 932 F.2d 898 (10th Cir. 1991). The Tenth Circuit went on to explain,

> [W]e follow the Ninth Circuit's lead in *In re American Hardwoods, Inc.*, and hold that while a temporary stay prohibiting a creditor's suit against a nondebtor . . . during the bankruptcy proceeding may be permissible to facilitate the reorganization process in accord with the broad approach to nondebtor stays under section 105(a) outlined above, the stay may not be extended post-confirmation in the form of a permanent injunction that effectively relieves the nondebtor from its own liability to the creditor.

Id. (citing *Am. Hardwoods*, 885 F.2d at 625).

57. *Id.* at 594. Able, an attorney, was hired by Landsing Diversified Properties in an action against Public Service Companies of Oklahoma (PSO) for damaging property. After settling the case for $3 million, Able secured an attorney's lien against Landsing. A short time later, Landsing petitioned for Chapter 11 bankruptcy. Landsing filed suit against First National Bank and Trust Company of Tulsa, which held the mortgage on the damaged property. At that point Abel was brought into the suit as a third-party defendant to determine what rights he would have to the proceeds of a potential settlement between Landsing and PSO. The Tenth Circuit did not allow the bankruptcy court to enjoin Able's claim to a portion of the settlement proceeds. *Id.* at 594–95.

58. *Id.* at 601. The Tenth Circuit explained further,

> Not only does such a permanent injunction improperly insulate nondebtors in violation of section 524(e), it does so without any countervailing justification of debtor protection—as discussed earlier, the discharge injunction provided for in section 524(a) already frees the debtor from potential derivative claims, such as indemnification or subrogation, that might arise from the creditor's post-confirmation attempts to recover the discharged debt from others.

Id. at 602.

59. *Id.* at 600.

According to the Tenth Circuit, the provisions of the Code will bind the debtor and all creditors, but under § 524(e) the confirmation of a plan cannot discharge any other nondebtor party from liability.[60]

C. The Fifth, Seventh, and Third Circuits: Not Recognizing Injunctions of Claims Against Nondebtor Parties, but Conceiving of Situations Where This Might Be Possible

The Fifth, Seventh, and Third Circuits have issued opinions that do not exactly fit into either of the above two camps. Taking a different approach than any of the other federal circuit courts of appeal, the analysis of the Fifth and Seventh Circuits distinguishes a *discharge* and a *release*. Specifically, the analysis concludes that § 524(e) precludes a discharge that affects third-party liability.[61] At the same time, this analysis allows a bankruptcy court to release claims against third parties by creditors voting for the reorganization plan while preserving claims by creditors who either do not vote or vote against the plan.[62] The Third Circuit, while holding that it has not established a rule for nondebtor releases, nevertheless discusses what might constitute facts acceptable for such a release.[63]

The Fifth Circuit's first impression examination of § 524 occurred in 1987.[64] The bankruptcy court had confirmed a reorganization plan that released a guarantor of direct liability from various creditor claims.[65] Because only the effect of the release was being examined on direct appeal, the court did not examine the legality of the release itself.[66] However, the court noted that "[a]lthough section 524 has generally been interpreted to preclude *release* of guarantors by a bankruptcy court, the statute does not by its specific words preclude the *discharge* of a guaranty when it has been accepted and confirmed as an integral part of a plan of reorganization."[67]

60. *Id.* at 601–02.

61. *See, e.g.*, *In re* Zale Corp., 62 F.3d 746, 760 (5th Cir. 1995).

62. *See, e.g.*, *In re* Specialty Equip. Cos., 3 F.3d 1043, 1047 (7th Cir. 1993).

63. *In re* Cont'l Airlines, 203 F.3d 203, 214 (3d Cir. 2000).

64. Republic Supply Co. v. Shoaf, 815 F.2d 1046 (5th Cir. 1987).

65. *Id.* at 1048.

66. *Id.* at 1050.

67. *Id.* (emphasis added). Other than the Fifth and Seventh Circuits, none of the federal circuit courts of appeal make any distinction between a release and a discharge in discussion of § 524(e).

Eight years after determining that a bankruptcy court can release claims of creditors against third parties via creditor approval, the Fifth Circuit reexamined the issue.[68] This time, in language similar to the Ninth and Tenth Circuits, the Fifth Circuit cited § 524(e) and held that a bankruptcy court did not have the power to discharge the debts of a third party.[69] The Fifth Circuit also distinguished its holding from the cases in sister circuits that did allow permanent injunctions of creditor claims against nondebtor third parties.[70] Those circuits that allowed permanent injunctions "channeled those claims to allow recovery from separate assets and thereby avoided discharging the nondebtor."[71]

The Fifth Circuit read previous decisions as precedent for allowing a *temporary* injunction of nondebtor claims only while the bankruptcy reorganization is occurring. The court recognized that the Code gave a bankruptcy court broad authority to effectuate a reorganization plan, but concluded that a "'fair and equitable' determination does not give the bankruptcy court jurisdiction over settlement conditions that do not bear on the court's duties to preserve the estate and protect creditors."[72] Because the court read § 524(e) as specifically prohibiting the discharge of debts of nondebtors, any permanent injunction under § 105 that would effectively discharge a nondebtor would be facially inconsistent with § 524.[73] However, the court suggested that facts meeting the Ninth Circuit's "unusual circumstances test" would give a bankruptcy court power to grant a temporary injunction of third-party claims in order to effectuate a reorganization.[74]

68. *In re* Zale Corp., 62 F.3d 746 (5th Cir. 1995). Zale Corporation filed for bankruptcy. The creditors decided that they wanted to file suit against CIGNA, which insured the directors of the Zale Corporation. The Zale reorganization plan attempted to extinguish any future claim that NUFIC, the insurance company for Zale that was not a party to the bankruptcy proceeding, might have against CIGNA for its actions during the settlement of the claim. *Id.* at 749–50.

69. *Id.* at 760.

70. *Id.* at 760–61.

71. *Id.* at 760.

72. *Id.* at 754.

73. *Id.* at 759–60.

74. *Id.* at 760. Specifically, if the debtor and the nondebtor share an identity of interests, or if the third-party action will have an adverse impact on the debtor's ability to reorganize, then a temporary injunction might be permissible. "If not, a bankruptcy court may not enjoin the third-party action." *Id.* at 761. Even with unusual circumstances a temporary injunction will not be granted by the bankruptcy court unless the injunction constitutes a "key

The Seventh Circuit case law, like that of the Fifth Circuit, hangs on two principle decisions that distinguish a release from a discharge.[75] In one of the first cases to examine the scope of § 524(e), the Seventh Circuit announced that a bankruptcy court does not have the power to discharge the liabilities of a debtor's guarantor.[76] The circuit relied on Section 16 of the Bankruptcy Act of 1898[77] as evidence that the congressional intent of § 524 did not allow a reorganization plan to alter the liability of third parties.[78] Furthermore, creditor approval cannot act as a private contract to discharge or relieve the liability of a debtor's guarantors[79] because a "bankruptcy discharge arises by operation of federal bankruptcy law, not by contractual consent of the creditors."[80]

The Seventh Circuit reexamined the issue ten years later and concluded that releases of third-party liability were permissible.[81] Like its previous decision, the court noted that Section 16 of the Bankruptcy Act of 1898 explicitly prohibited the discharge of guarantors, regardless of impact to the reorganization plan.[82]

provision" of the plan. *Id.* at 762. The Fifth Circuit misinterpreted the Ninth Circuit's use of the "unusual circumstances" test. In *American Hardwoods*, the Ninth Circuit held that § 524(e) prohibited a bankruptcy court from enjoining third-party claims. Then, it stated that "[e]ven if we adopted . . . [the Fourth Circuit's test], it would not dictate a different result." *In re* Am. Hardwoods, Inc., 885 F.2d 621, 626 (9th Cir. 1989). The Ninth Circuit's five-proug test was not identical to the Fourth Circuit's "unusual circumstances" test. Neither the Ninth Circuit's five-prong test, nor the Fourth Circuit's "unusual circumstances" test made the distinction between a permissible temporary and a prohibited permanent injunction of third-party claims that the Fifth Circuit makes here.

75. Union Carbide Corp. v. Newboles, 686 F.2d 593 (7th Cir. 1982); *In re* Specialty Equip. Cos., 3 F.3d 1043 (7th Cir. 1993).

76. *Union Carbide*, 686 F.2d at 595. The court relied on the text of § 524(e) to say that the creditors' approval of a bankruptcy plan cannot discharge the debtor's guarantors. *Id.*

77. 11 U.S.C. § 34 (1978) (repealed Oct. 1, 1979).

78. *Union Carbide*, 686 F.2d at 595.

79. *Id.*

80. *Id.*

81. *In re* Specialty Equip. Cos., 3 F.3d 1043, 1047 (7th Cir. 1993). Specialty Equipment Companies was a debtor in Chapter 11 bankruptcy. It owed money to several substantial creditors including GECC. Nielsen and Kostantacos filed suit representing shareholders in Specialty against GECC. As part of the reorganization of Specialty, the plan provided that all creditors voting in the plan were "deemed to give Releases to a number of third parties . . . from any liability arising out of a relationship with the Debtors." *Id.* at 1045.

82. *Id.* at 1046 n.3 ("Section 16 of the Bankruptcy Act of 1898 provided that '[t]he liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.'" (quoting 11 U.S.C. § 34 (1978) (repealed Oct. 1, 1979))).

However, although § 524(e) "preclude[s] the discharge of guarantors, the statute does not by its specific words preclude all releases that are accepted and confirmed as an integral part of a reorganization."[83] The court distinguished between an involuntary release of liability, which would violate § 524(e), and a "consensual" and "non-coercive" release under the Code.[84] The court concluded that a consensual release is permissible because it binds only those creditors voting in favor of the reorganization plan; creditors voting to reject the plan or creditors not voting might preserve the right to pursue future claims.[85]

The Seventh Circuit allows for the possibility of releases to individual creditors voting for the reorganization plan, but reads § 524(e) as a blanket prohibition of any action which might affect the liability of third-party claimants.[86] Under this rationale, "a per se rule disfavoring all releases in a reorganization plan would be . . . unwarranted, if not a misreading of the statute."[87] Moreover, the Seventh Circuit suggests that enjoining any claims that are not directly against the debtor will create an "incentive to enter bankruptcy for reasons that have nothing to do with the purposes of bankruptcy law."[88]

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83. *Specialty Equip. Cos.*, 3 F.3d at 1047.

84. *Id.*

85. *Id.*

86. The Third Circuit examined the seeming discrepancy in Seventh Circuit's opinions this way:

> In the oft-cited *Specialty Equipment* decision, the Seventh Circuit stated that *consensual* releases, at the very least, do not run afoul of 11 U.S.C. § 524(e), but the appeal was dismissed as moot and not on the merits. This dicta in *Specialty Equipment* nonetheless has called into question the vitality of an earlier Seventh Circuit decision interpreting the precursor to section 524(e), section 16 of the Bankruptcy Reform Act of 1898, and concluding that the statute specifically prohibited the discharge of non-debtor guarantors, regardless of a provision in a plan of reorganization.

In re Cont'l Airlines, 203 F.3d 203, 213–14 n.10 (3d Cir. 2000) (citations omitted).

87. *Specialty Equip. Cos.*, 3 F.3d at 1047.

88. Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 163 (7th Cir. 1994). The court further explained,

> If the [bankruptcy] court could do all these nice things [release third parties from liability] the result would indeed be to make the property of bankrupts more valuable than other property—more valuable to the creditors, of course, but also to the debtor's shareholders and managers to the extent that the strategic position of the debtor in possession in a reorganization enables the debtor's owners and managers to benefit from bankruptcy.

Id.

The major discussion of § 524 in the Third Circuit comes from a recent case, *In re Continental Airlines*,[89] in which various shareholders sued Continental Airlines along with several directors and officers.[90] During the ensuing Chapter 11 bankruptcy proceeding, the bankruptcy court confirmed a reorganization plan that released and enjoined shareholder claims against directors and officers.[91] The Third Circuit Court of Appeals examined the issue on appeal.

At the outset, the circuit court recognized that the Code does not explicitly authorize a bankruptcy court to release and permanently enjoin claims against third parties.[92] Although the court stated that it would not establish a rule as to when third-party releases might be permissible, the court discussed the considerations that might warrant a bankruptcy court's use of a permanent injunction of creditor claims against a third party.[93] In language similar to the Second and Fourth Circuit cases, the Third Circuit reasoned that a bankruptcy court might examine whether there was fairness in the plan, an identity of interests between the debtors and the third parties which might implicate indemnification, a necessity for a successful reorganization, an exchange for reasonable consideration, and a specific finding to support each conclusion of the bankruptcy court.[94] Although the Third Circuit has not yet authorized a bankruptcy court to permanently enjoin creditor claims against third-party nondebtors, the considerations it raised in dicta in *In re Continental Airlines* formed the basis for the Sixth Circuit's decision in *In re Dow Corning*.

III. *IN RE DOW CORNING*

Dow Chemical Company and Corning Glass, Inc. created a subsidiary, Dow Corning Corporation, to manufacture silicone-gel products. Dow Chemical and Corning Glass were the only shareholders of Dow Corning. Dow Corning Corporation

89. 203 F.3d 203 (3d Cir. 2000).
90. *Id.* at 205–06.
91. *Id.* at 206.
92. *Id.* at 211.
93. *Id.* at 213–14.
94. *Id.* at 214–15.

introduced silicone-gel breast implants to the market in 1964.[95] Dow Corning subsequently created a host of subsidiary and affiliate companies that marketed its silicone-gel products worldwide.

The popular breast implant procedure encountered problems when many of the sealed-gel packets leaked.[96] After reports of silicone-caused systemic disease began appearing in the 1980s, women began filing lawsuits, alleging that the silicone gel caused "auto-immune connective tissue disease[s] such as lupus, Scleroderma or rheumatoid arthritis."[97] Lawsuits alleged a variety of ailments that were never conclusively tied to the silicone gel.[98] Despite the lack of evidence, Dow Corning stopped marketing the silicone-gel implants in March of 1989.[99]

Following a 1992 order from the Food and Drug Administration (FDA), the silicone-gel implants were removed from the market. Without the endorsement of the FDA, the number of lawsuits against Dow Corning as a producer of the implants skyrocketed.[100] Thousands of lawsuits were filed against Dow Corning and its shareholders, Dow Chemical Company and Corning Glass, Inc., that claimed various auto-immune reactions to the implants.[101] In 1994, a multidistrict litigation court approved a $4.255 billion global settlement to which Dow Corning contributed $2.02 billion.[102] However, approximately 440,000 women, many more than were expected, applied to participate in the fund.[103] Moreover, an additional 15,000 women chose to opt out of the settlement to preserve their rights to pursue individual trials.[104] Consequently, the

95. *In re* Dow Corning Corp., 255 B.R. 445, 461 (Bankr. E.D. Mich. 2000).

96. *Id.* Inserts were added to the packages that warned "recipients of the potential non-pathogenic side effects." *Id.*

97. *Id.*

98. *Id.* at 461–62.

99. *Id.* at 462.

100. *In re* Dow Corning Corp., 280 F.3d 648, 653 (6th Cir. 2002).

101. *Id.*

102. *Id.*

103. *Id.*; *see also* MARCIA ANGELL, SCIENCE ON TRIAL 22 (1996); Joseph Samet & Julie McAdams, *Partnership and Partner Case Update (1997–2002)*, *in* 25TH ANNUAL CURRENT DEVELOPMENTS IN BANKRUPTCY & REORGANIZATION 1277, 1286 (PLI Commercial Law & Practice Course, Handbook Series No. A-849, 2003) ("More than 18,000 separate lawsuits were consolidated and Dow Corning proposed a global settlement. Over 440,000 women filed claims to take part in the settlement, far more than anticipated by the parties to the settlement proposal.").

104. ANGELL, *supra* note 103, at 22.

settlement fell apart. By 1995, Dow Corning was faced with the impossible task of defending "over 19,000 individual silicone-gel breast implant class actions, 45 putative silicone-gel breast implant class actions, and 470 lawsuits involving nonbreast implant medical products."[105] Dow Corning filed for Chapter 11 bankruptcy and attempted to transfer all breast implant claims to the Eastern District of Michigan.[106]

After lengthy examination of the bankruptcy issues over a period of several years, a plan for reorganization was adopted by the court.[107] The bankruptcy court's plan for reorganization included the establishment of a $2.35 billion fund for payment of claims already asserted against Dow Corning. Also included in the plan, as a quid pro quo for allowing payment from the fund, were two provisions that respectively released Dow Corning's insurers and shareholders from further liability on personal injury claims and permanently enjoined parties from bringing action against Dow Corning's insurers, shareholders, or subsidiaries once those claims were satisfied as against Dow Corning.[108] The joint plan permanently enjoined persons who had filed or might file claims from pursuing those claims against the released parties.[109] The bankruptcy court interpreted § 524(e) to provide that "a third party's liability is not discharged by virtue of a discharge of the debtor's liability," and that "entry of a non-debtor injunction—regardless of whether it is consensual—is not incompatible with § 524(e)."[110] The bankruptcy court went on to conclude that since no other provision in the Code addressed the issue exactly, the injunction and release provisions in Dow Corning's reorganization plan were "not inconsistent with the Code even if they apply to creditors who did not accept the Plan."[111] However, the bankruptcy court then determined that this type of permanent injunction may only apply to consenting creditors.[112]

105. *In re* Dow Corning Corp., 255 B.R. 445, 462 (Bankr. E.D. Mich. 2000).

106. *Dow Corning Corp.*, 280 F.3d at 654.

107. *In re* Dow Corning Corp., 244 B.R. 721, 726 (Bankr. E.D. Mich. 1999).

108. *Dow Corning Corp.*, 280 F.3d at 655.

109. *Dow Corning Corp.*, 244 B.R. at 735–36. See *supra* note 8 for details of the reorganization plan.

110. *Dow Corning Corp.*, 244 B.R. at 740.

111. *Id.* The injunction and release provisions are sections 8.3 and 8.4 in Dow Corning's Reorganization Plan. *Id.*

112. *Id.* at 740–47.

The U.S. District Court for the Eastern District of Michigan issued a Memorandum Opinion and Order affirming the bankruptcy court, which was appealed to the U.S. Court of Appeals for the Sixth Circuit.[113] The amended and approved reorganization plan was reviewed by the U.S. District Court for the Eastern District of Michigan, which concluded that an injunction of claims in favor of nondebtor third parties may apply to both consenting and nonconsenting creditors.[114] The Sixth Circuit affirmed the district court's analysis but remanded the case to the district court for further factual determinations.[115]

The district court then found that the bankruptcy court had authority to enjoin the claims of nonconsenting creditors. When the matter was appealed to the Sixth Circuit for the second time, the circuit court affirmed, holding that a bankruptcy court may grant a permanent injunction under "unusual circumstances" which enjoins both consenting and nonconsenting creditor claims against a nondebtor as part of a bankruptcy reorganization.[116] The court held that § 105(a) gave bankruptcy courts the "broad equitable power" to grant injunctions when they were "necessary or appropriate" to furthering the policies of the Code.[117] Furthermore, § 524(e) was not a bar to the injunction of nondebtor claims. Specifically, to facilitate reorganization and resolution of large and complex mass litigations, a bankruptcy court may enjoin a nonconsenting creditor's claims when all of the seven requisite factors are present.[118] The Sixth

113. *Dow Corning Corp.*, 280 F.3d at 653.

114. *In re* Dow Corning Corp., 255 B.R. 445, 480–81 (Bankr. E.D. Mich. 2000).

115. *Dow Corning Corp.*, 280 F.3d at 663.

116. *Id.* at 656–58.

117. *Id.* at 657–58.

118. *Id.* at 658. The court laid out the seven factors:

> We hold that when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor: (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7)

Circuit then remanded to the district court for further factual findings consistent with its particular "unusual circumstances" test.[119]

IV. ANALYSIS

This section analyzes the reasoning of the Sixth Circuit in light of the other circuits that have confronted the issue of whether a bankruptcy court has the authority to enjoin a creditor's claims against a nondebtor.[120] First, it examines the competing policy considerations in a Chapter 11 bankruptcy proceeding in the context of mass tort litigation. Second, it examines the court's interpretation of a bankruptcy court's power as granted by the plain language of § 105(a) in the Code, concluding that the Sixth Circuit's interpretation was logically consistent with respect to other circuit court reasoning. Third, it concludes that the Sixth Circuit correctly held that in the presence of mass tort litigation a bankruptcy court is not limited by § 524(e) to permanently enjoin nonconsenting creditors' claims in the interest of judicial economy and finality of litigation. Fourth, this section looks at the policy considerations and rationale behind the court's unusual circumstances test.[121] Fifth, this analysis concludes that the Sixth Circuit chose the only logical conclusion that would both facilitate the Chapter 11 bankruptcy reorganization of Dow Corning and accelerate the finality of future mass tort[122] and complex litigation in the bankruptcy court.[123]

> The bankruptcy court made a record of specific factual findings that support its conclusions.

Id.

119. *Id.* at 663. The U.S. District Court for the Eastern District of Michigan issued its findings in a recent unpublished opinion available through the Sixth Circuit's website. The district court found that Dow Corning met all seven requirements of the unusual circumstances test; therefore, the bankruptcy court's permanent injunction of claims against nondebtor parties was appropriate. *In re* Dow Corning Corp., No. 95-20512 (E.D. Mich. Dec. 11, 2002), *available at* http://www.mied.uscourts.gov/_dow/orders/orderpdf/DCC DismissConsolodiate.pdf.

120. The Supreme Court rarely chooses to hear cases on bankruptcy law. Were this issue to be heard before the Supreme Court, it would be an issue of first impression.

121. Deborah A. Crabbe, *Are Non-debtor Releases/Permanent Injunctions Authorized Under the Bankruptcy Code?*, 22 AM. BANKR. INST. J., May 2003, at 34–35 ("What makes the *Dow Corning* decision so important is that the court took the time to distill and articulate the factors relied upon by the *A.H. Robins* and *Drexel Burnham* courts in finding that a non-debtor release or injunction was appropriate under the circumstances.").

122. For purposes of this analysis, mass tort "airplane crashes" and "toxic" torts are not distinguished. "Toxic" torts include "injuries from asbestos, drugs, or prosthetic devices, where over a period of time an injurious product affects—at least, the product is alleged to

A. The Competing Policy Considerations Behind a Successful Chapter 11 Reorganization

A Chapter 11 bankruptcy proceeding in a complex litigation or mass tort context has similar policy considerations to a Chapter 11 proceeding under normal circumstances. The proceeding is designed to stay litigation pending against the debtor to allow the debtor to reorganize or liquidate.[124] Bankruptcy is not designed to allow the debtor to escape liability to the creditors.[125] In fact, one of the purposes of the Chapter 11 proceeding is to maximize creditor claims.[126] Traditionally, bankruptcy courts have not had authority over any claim which is not directly against the debtor, even if it may affect the reorganization plan.[127]

In the context of mass tort litigation bankruptcy, the bankruptcy court reorganization plan should serve to fairly compensate, to the greatest extent possible, each of the creditors' claims against the debtor.[128] The bankruptcy court has the added problem of creditor claims against nondebtor parties which could indemnify the debtor

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have affected—some victims with apparently serious effects, some with moderate effects, and others with little or no discernible effects." Geoffrey C. Hazard, Jr., *The Futures Problem*, 148 U. PA. L. REV. 1901, 1902 (2000).

123. *Compare* Frederick Tung, *The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry*, 3 CHAP. L. REV. 43, 46–50 (2000), *with* Richard A. Nagareda, *Future Mass Tort Claims and the Rule-Making/Adjudication Distinction*, 74 TUL. L. REV. 1799–1801 (2000).

124. *See* ELIZABETH WARREN, THE LAW OF DEBTORS AND CREDITORS 161–63, 1024, 1029 (2001); Catherine E. Vance & Paige Barr, *The Facts & Fiction of Bankruptcy Reform*, 1 DEPAUL BUS. & COM. L.J. 361, 369 (2003). In the mass tort context, the bankruptcy court has added pressure from the sheer volume of cases that may have forced a defendant into bankruptcy. The economic analysis of the defendant that may decide to settle rather than litigate may also increase the number of case filings. Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1731–32 (2002).

125. Martin J. Bienstock, *Recent Developments Affecting Chapter 11 Cases*, *in* 25TH ANNUAL CURRENT DEVELOPMENTS IN BANKRUPTCY & REORGANIZATION 7, 50 (PLI Commercial Law & Practice Course, Handbook Series No. A-850, 2003); Nagareda, *supra* note 123, at 1799–1800.

126. *In re* Dow Corning Corp., No. 95-20512, slip op. at 25, 28 (E.D. Mich. Dec. 11, 2002), *available at* http://www.mied.uscourts.gov/_dow/orders/orderpdf/DCCDismiss Consolodiate.pdf.

127. Union Carbide Corp. v. Newboles, 686 F.2d 593, 595 (7th Cir. 1982).

128. *In re* Dow Corning Corp., No. 95-20512, slip op. at 25 (E.D. Mich. Dec. 11, 2002), *available at* http://www.mied.uscourts.gov/_dow/orders/orderpdf/DCCDismiss Consolodiate.pdf. There is also the additional incentive to finalize the litigation to preserve the structure of the reorganization. *See also* Stanley L. Ferguson, *A Company Perspective*, WL SHO43 A.L.I.-A.B.A. 17, 20 (2002).

and ruin the Chapter 11 reorganization plan.[129] If the bankruptcy court were to enjoin these creditor claims, it would be taking away an otherwise valid cause of action. Although a bankruptcy court generally does not have authority over creditor claims against nondebtor third parties, when the nondebtor parties significantly contribute to the reorganization plan the resulting compensation to the creditors may be greater.[130] Furthermore, the debtor does not escape liability (although the debtor may not be forced to liquidate). Because the bankruptcy court may enjoin future claims against both the debtor and the nondebtor parties, the reorganization will end the litigation.[131]

B. The Bankruptcy Court's Power Under 11 U.S.C. § 105

The Sixth Circuit correctly recognized that § 105(a) grants the bankruptcy court broad equitable powers that may be used consistently with the other provisions of the statute.[132] The Sixth Circuit, like its sister circuits, recognized that the bankruptcy court has been given broad authority under the Code to effectuate reorganization or liquidation of entities in Chapter 11 proceedings. The Sixth Circuit cites two traditional sources for a bankruptcy court's authority. First, § 105(a) explicitly authorizes a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Second, the

129. *In re* Dow Corning Corp., No. 95-20512, slip op. at 25 (E.D. Mich. Dec. 11, 2002), *available at* http://www.mied.uscourts.gov/_dow/orders/orderpdf/DCCDismiss Consolodiate.pdf.

130. *See In re* Cont'l Airlines, 203 F.3d 203, 213–14 (3d Cir. 2000).

131. *In re* Dow Corning Corp., No. 95-20512, slip op. at 28 (E.D. Mich. Dec. 11, 2002), *available at* http://www.mied.uscourts.gov/_dow/orders/orderpdf/DCCDismiss Consolodiate.pdf.

132. *In re* Dow Corning Corp., 280 F.3d 648, 656 (6th Cir. 2002). Professor Cole of Stanford Law School describes § 105 this way:

> Section 105(a) is a broad grant of equitable power to courts sitting in bankruptcy. This grant expanded the scope of authority enjoyed by bankruptcy courts before the 1986 amendments to the Code. The predecessor to section 105(a) of the Code is section 2(a)(15) of the Bankruptcy Act of 1898 . . . . Under the Act, there was no explicit provision authorizing a bankruptcy court to stay an action against a nonbankrupt co-debtor. Nevertheless, bankruptcy courts had equitable power under section 2(a)(15) to enjoin actions to protect property of the estate and to aid in estate administration.

Marcus G. Cole, *A Calculus Without Consent: Mass Tort Bankruptcies, Future Claimants, and the Problem of Third Party Non-debtor "Discharge,"* 84 IOWA L. REV. 753, 760 (1999).

court affirms the bankruptcy court's traditional role as a court of equity, which provides a blanket authorization to take any "equitable measures needed to implement other sections of the Code."[133]

The Sixth Circuit then found an additional basis for recognizing a bankruptcy court's authority to grant injunctions. The court relied on the text of 11 U.S.C. § 1123(b)(6) as a statutory allowance for a bankruptcy court to effectuate any measure which furthers a reorganization but does not contradict the statute.[134] Specifically, a reorganization plan may "include any other appropriate provision not inconsistent with the applicable provisions of this title."[135] The provision grants the bankruptcy court "considerable discretion" when exercising its broad equitable powers under § 105(a).[136] This "discretion" was a clear statutory concession of authority that would allow a bankruptcy court to realize successful reorganization of debtor companies in "mass-litigation" cases.[137] The court recognized that this "discretion," when coupled with the broad equitable powers of a bankruptcy court, would be a "substantial power" to finalize complex reorganization plans.[138]

In addition, the Sixth Circuit held that §§ 105(a) and 1123(b)(6) grant a bankruptcy court sufficient authority to handle complex reorganizations. All circuit courts agree that § 105(a) endows bankruptcy courts with broad equitable powers so long as those powers are used consistently with other provisions in the Code and when the injunction is either "necessary" or "appropriate" for the reorganization. All of the other circuits accept bankruptcy courts as traditional courts of equity, but the Sixth Circuit went a step further in citing § 1123(b)(6) as an additional statutory grant of power. This particular provision allows the bankruptcy court to act as a forum to resolve "large and complex mass litigation[]."[139] This is

133. *Dow Corning Corp.*, 280 F.3d at 656.

134. *Id.* at 658. The Supreme Court has also recognized that a bankruptcy court has broad equitable powers that can be used consistently with traditional definitions of equitable relief. *See* Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc., 527 U.S. 308, 321 (1999).

135. 11 U.S.C. § 1123(b)(6) (2000) ("Subject to subsection (a) of this section, a plan may . . . include any other appropriate provision not inconsistent with the applicable provisions of this title.").

136. *Dow Corning Corp.*, 280 F.3d at 656–57.

137. *Id.* at 656.

138. *Id.*

139. *Id.*

significant because large or complex litigation may involve thousands of creditors with nearly unlimited potential to evade resolution outside of bankruptcy court. A mass litigation proceeding in the bankruptcy court may therefore require special attention and/or additional power to effectuate a successful reorganization.

C. Section 524(e) Does Not Limit the Power of the Bankruptcy Court to Resolve Mass Tort Litigation

The Sixth Circuit correctly recognized that nothing in the language of § 524(e) prohibits the release of a nondebtor.[140] With this reading, the Sixth Circuit confirmed the holdings of the Second, Third, Fourth, Fifth, Seventh, and D.C. Circuit Courts.[141] The Sixth Circuit followed the Seventh Circuit's reasoning that § 524(e) "explains the effect of a debtor's discharge . . . [but] does not prohibit the release of a non-debtor."[142]

The Sixth Circuit's interpretation of § 524(e) comports with a congressional intent to allow a bankruptcy court to wield enormous power to bring finality to mass tort and complex litigation. Following the Second and Fourth Circuits' decisions which allowed a bankruptcy court to resolve the mass tort litigation surrounding asbestos cases, Congress amended § 524 to add § 524(g). The legislative history of the Bankruptcy Reform Act of 1994 (BRA) indicates that although the addition of § 524(g) was modeled after the *Johns-Manville* decision for asbestos cases, it does not limit the application of an injunction provision to nondebtor parties in other mass tort or complex litigation cases where such a provision might be necessary.[143] The BRA as enacted in 1994 stated specifically that

140. *Id.* at 657. Section 524(e) reads, "Except as provided in subsection (a)(3) of this section, discharge of a debtor of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e) (2000).

141. *See, e.g.*, Republic Supply Co. v. Shoaf, 815 F.2d 1046, 1050 (5th Cir. 1987) ("Although section 524 has generally been interpreted to preclude release of guarantors by a bankruptcy court, the statute does not by its specific words preclude the discharge of a guaranty when it has been accepted and confirmed as an integral part of a plan of reorganization.").

142. *Dow Corning Corp.*, 280 F.3d at 657 (citing *In re* Specialty Equip. Cos., 3 F.3d 1043, 1047 (7th Cir. 1993)).

143. H.R. REP. NO. 103-835 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340. Warren writes, "[T]he foregoing 'rule of construction' [§ 111 of the Bankruptcy Reform Act] appears in the Statutes at Large and may be cited as being at 108 Stat. 4117 (1994)." Warren, *supra* note 55, at 12; *see also* Efrat B. Zisblatt & Michael L. Tuchin, *Third Party Releases*, *in* 22ND

"[n]othing in subsection (a) [of § 524(g)], or in the amendments made by subsection (a), shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization."[144] Therefore, Congress did not intend to prohibit the injunction of a third-party nondebtor in a non-asbestos case.

The Sixth Circuit appropriately joined the Second, Third, Fourth, and D.C. Circuits in holding that a bankruptcy court can enjoin claims against nondebtors if the reorganization would be ineffective without it.[145] In certain situations, a corporation (like Dow Corning) may file for bankruptcy to stay litigation against itself when there are claims outstanding (with near-identical facts) against its shareholders or against affiliate or subsidiary corporations. The debtor corporation (Dow Corning) is brought into any suit against its shareholders, affiliates, or subsidiaries (nondebtor parties) through contribution or indemnification claims. These nondebtor parties have an incentive to contribute significant funds to the debtor's reorganization in exchange for a release from future liability. The possibility of future suits against these nondebtor parties provides an incentive either to contribute less or not to contribute at all to the debtor's reorganization plan. Furthermore, future suits against the nondebtor parties indicate that the debtor (Dow Corning) would still have to defend claims *after* reorganization via contribution or indemnification. Therefore, without a provision to stop future suits that would indemnify the debtor, both the size of the debtor's estate and the debtor's ability to proceed in reorganization are adversely affected.[146]

To maximize satisfaction to creditors, a bankruptcy court must be allowed to enjoin claims. As a routine matter, a bankruptcy court

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ANNUAL CURRENT DEVELOPMENTS IN BANKRUPTCY & REORGANIZATION 495, 499–500 (PLI Commercial Law & Practice Course, Handbook Series No. A-805, 2000).

144. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111(b), 108 Stat. 4117 (1994).

145. *Dow Corning Corp.*, 280 F.3d at 656; *see also In re* Cont'l Airlines, 203 F.3d 203, 213 (3d Cir. 2000); *In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 293 (2d Cir. 1992); *In re* A.H. Robins Co., 880 F.2d 694, 702 (4th Cir. 1989); *In re* MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 91 (2d Cir. 1988); *In re* AOV Indus., 792 F.2d 1140, 1145 (D.C. Cir. 1986).

146. *In re* Dow Corning Corp., No. 95-20512, slip op. at 20–22 (E.D. Mich. Dec. 11, 2002), *available at* http://www.mied.uscourts.gov/_dow/orders/orderpdf/DCCDismissConsolodiate.pdf.

may stay litigation against a debtor and satisfy creditors as part of reorganization because any suit against a debtor that survived the bankruptcy proceeding unsettled might defeat the reorganization. Money diverted to litigate or defend claims would also deplete the assets available for satisfaction to creditors,[147] so, in the interest of maximum satisfaction to creditors, a bankruptcy court should be allowed to permanently enjoin claims.

As mentioned above, various policy considerations indicate that a bankruptcy court should be allowed to enjoin third-party claims when the injunction is necessary to the reorganization. As in *Dow Corning*, thousands of suits pending against the shareholders constitute a significant threat to the debtor's reorganization. Without injunctions, there would be a significant delay to the reorganization and a drastic increase in litigation costs to the debtor and to the creditors. This unreasonable delay would also require enormous judicial resources to handle the increased litigation. A bankruptcy court is uniquely designed to conserve judicial and litigation resources by reorganizing debtors, satisfying creditors, and bringing finality to litigation. Therefore, in order to achieve these goals, a bankruptcy court should have the power to enjoin claims in favor of certain nondebtor parties to successfully effectuate a reorganization plan.

The Ninth and Tenth Circuit Courts erroneously concluded that the addition of § 524(g) to the Code in 1994 indicated a congressional intention to allow the enjoining of third parties only in asbestos cases.[148] The implication is that any injunction of third-party nondebtors outside of asbestos cases would be a violation of § 524(e)—which the court read as a blanket prohibition against such injunctions.[149] The legislative history discussed above, however, expressly contradicts the Ninth Circuit view.[150]

147. The same is true for nondebtor parties that may indemnify the debtor under the same facts and thereby defeat a reorganization.

148. *See In re* Lowenschuss, 67 F.3d 1394, 1402 n.6 (9th Cir. 1995); Cole, *supra* note 132, at 775 ("The *Lowenschuss* court neglected to examine, however, the legislative history of the Bankruptcy Reform Act of 1994 and subsection 524(g). The legislative history clearly states that inferences, such as that drawn in *Lowenschuss*, misrepresent the intent behind the addition of the injunction provision of subsection 524(g).").

149. *Lowenschuss*, 67 F.3d at 1402 n.6.

150. *See supra* notes 140–44 and accompanying text.

> Section 111 [suggesting addition of subsection (g) to 524] contains a rule of construction to make clear that the special rule being devised for the asbestos claim

Furthermore, the Ninth and Tenth Circuits incorrectly suggest that any enjoining of third-party claimants would create an incentive for nondebtors to push a corporation into bankruptcy reorganization so that the court might enjoin claims against the nondebtor parties.[151] However, even if a bankruptcy court were to enjoin claims in favor of a nondebtor shareholder, generally that injunction would not come without a considerable price to the shareholder. For example, the shareholder may have to contribute funds to the reorganization in consideration for the injunction.[152] Alternatively, the economic drop in value of the corporation in the bankruptcy proceeding would hurt the shareholders. Pushing a corporation into bankruptcy may not only deplete the value of the company, but also may make the shareholder liable for his fraudulent acts.[153] A bankruptcy court's power to enjoin claims in favor of third-party nondebtors is therefore not likely to create an incentive for a corporation to pursue bankruptcy fot any reason outside the purposes of the bankruptcy court.[154]

D. Limits on the Power to Enjoin Claims Against Nondebtors

A bankruptcy court should have power to enjoin creditor claims against nondebtor parties to finalize bankruptcy proceedings in circumstances of mass tort or complex litigation. The Sixth Circuit correctly determined that under § 105(a) a bankruptcy court has

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trust/injunction mechanism is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan or reorganization. Indeed, Johns-Manville and UNR firmly believe that the court in their cases had full authority to approve the trust/injunction mechanism. And other debtors in other industries are reportedly beginning to experiment with similar mechanisms. The Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable injunction of this kind. The Committee has decided to provide explicit authority in the asbestos area because of the singular cumulative magnitude of the claims involved.

140 CONG. REC. H10752-01 (daily ed. Oct. 4, 1994).

151. *See Lowenschuss*, 67 F.3d at 1401–02; *In re* W. Real Estate Fund, Inc., 922 F.2d 592, 601–02 (10th Cir. 1990).

152. *See In re* Heron, Burcherte, Ruckert & Rothwell, 148 B.R. 660, 687 (Bankr. D.C. 1992).

153. *Compare* Michelle J. White, *Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle*, 70 U. CIN. L. REV. 1319, 1338 (2002), *with* Daniel Keating, *Comment on White: Asbestos and Bankruptcy*, 70 U. CIN. L. REV. 1305, 1306–07 (2002).

154. *See* Keating, *supra* note 153, at 1308.

authority to exercise broad equitable power to enjoin claims.[155] Then it held that § 524(e) would not bar a bankruptcy court from enjoining claims against nondebtor parties.[156] The Sixth Circuit was not ready, however, to give bankruptcy courts the authority to apply an injunction under unlimited circumstances. The court of appeals determined that an injunction was such a "dramatic measure" that a bankruptcy court should apply considerable caution to ensure that its use be limited to those "unusual circumstances" where enjoining suits against nondebtor third parties might be appropriate.[157]

The Sixth Circuit also recognized that an unlimited grant of authority to bankruptcy courts was not within Congress's intent in enacting the Code. For example, a bankruptcy court's authority under § 105(a) is expressly limited to the power to issue any "order, process or judgment" to situations where it is "necessary *or* appropriate" to further the purposes of the bankruptcy court.[158] Generally, these purposes are to reorganize or liquidate the debtor and to satisfy creditors to the fullest extent possible.[159] The Sixth Circuit correctly recognized that § 105 grants bankruptcy courts broad equitable powers that might be used consistently with the other provisions to enjoin claims, but also recognized that that power should be limited to special circumstances.

Because the power to enjoin claims against third parties essentially takes away a cause of action for wrongs that may have been committed by nondebtors, it is reasonable to limit the occasions when a bankruptcy court might consider such an injunction. Although the Second Circuit left the bankruptcy court with discretion to balance the reasonableness, fairness, and adequacy of the proposed settlement, other circuits have given different suggestions as to when a claim against a third party might be released.[160] Except for the circuits holding that there is a blanket prohibition against enjoining nondebtor claims, each circuit to

155. *In re* Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002).

156. *Id.*

157. *Id.*

158. 11 U.S.C. § 105(a) (2002) (emphasis added).

159. However, this is not a significant limitation to any creative bankruptcy court if the decision is couched in either the "necessary" or "appropriate" language. *Id.*

160. *See, e.g.*, *In re* Specialty Equip. Cos., 3 F.3d 1043, 1047 (7th Cir. 1993) (allowing consensual releases).

address the issue has built an increasingly narrow set of circumstances under which an injunction is acceptable.

Following the Second Circuit's *Johns-Manville* declaration that the enjoining of nondebtors was permissible where it was "essential" to the reorganization, several other circuits limited that broad test.[161] The Fourth Circuit held that an injunction of claims against nondebtors was essential to the reorganization where (1) the reorganization plan is overwhelmingly approved, (2) the plan "gives a second chance for even late claimants to recover," and (3) "the entire reorganization hinges on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor."[162] In addition, a bankruptcy court in the D.C. Circuit reasoned that an injunction must be "necessary" to the reorganization and that the nondebtor parties receiving the benefit of the injunction must give consideration in exchange for their release from liability.[163] The Ninth Circuit also added its interpretation of the Fourth Circuit test as dicta in *American Hardwoods*.[164] The Ninth Circuit test modified the Fourth Circuit test as follows: it split the first prong of the Fourth Circuit test into (1) 94% of creditors approved and (2) the injunction only affected 1.5% of claimants; it included the second prong; and it split the third prong into (1) the injunction was essential and (2) the entire reorganization hinged on the debtor being free from suits via contribution or indemnification.

Likewise, the Sixth Circuit wanted to limit the occasions when a bankruptcy court might use the power to enjoin claims against nondebtors. Once it determined that an injunction of claims against third-party nondebtors was not forbidden by § 524(e), the Sixth

161. MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 94 (2d Cir. 1988). The Second Circuit explained that "essential" means that the injunction plays an important part in the reorganization. "This enables the directors and officers to settle these suits without fear that future suits will be filed. Without the injunction, the directors and officers would be less likely to settle. Thus, we hold that the district court did not abuse its discretion in approving the injunction." *In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 293 (2d Cir. 1992).

162. *In re* A.H. Robins Co., 880 F.2d 694, 702 (4th Cir. 1989).

163. *In re* Heron, Burchette, Ruckert & Rothwell, 148 B.R. 660, 687 (Bankr. D.C. 1992). The bankruptcy court opinion that consideration be given for the benefit of an injunction and that the injunction be necessary to the reorganization is identical to the third prong of the Fourth Circuit's test.

164. *In re* Am. Hardwoods, Inc., 885 F.2d 621, 626 (9th Cir. 1989).

Circuit then attempted to minimize the bankruptcy court's future use of such an injunction. The circuit court suggested that the enjoining of claims should be saved for "unusual circumstances." The Sixth Circuit set forth a seven-factor test to define and limit the scope of possible applications of the unusual circumstances that might warrant a bankruptcy court's use of an injunction of claims in favor of nondebtor parties. The court listed a very narrow set of circumstances when a bankruptcy court might find it appropriate to enjoin a nonconsenting creditor's claims against a nondebtor. In its analysis, the court held that an injunction may be reasonable specifically where (1) there is an identity of interests between the debtor and the third party, (2) there is a substantial contribution to the reorganization by the nondebtor, (3) the injunction is essential to the reorganization, (4) the affected class accepts the plan enthusiastically, (5) there is a mechanism to pay for all of the classes affected, (6) there is a plan to provide for claims of nonsettling parties, and (7) these specific factual findings are made by the bankruptcy court.[165] Through the use of this test, the Sixth Circuit hoped to ensure that the power to enjoin claims would be used only infrequently and would not be abused by bankruptcy courts.

Although the Sixth Circuit's "unusual circumstances" test stems from similar policy justifications and reasoning as does the Fourth Circuit's test, the Sixth Circuit is more specific in defining the situations when a bankruptcy court may need to enjoin claims against third parties. First, the test mandates that the parties to be released from liability have an identity of interests with the debtor.[166] This is to ensure that a suit against the nondebtor would inevitably involve the debtor through contribution or indemnification. It requires that the claims against the debtor and the claims against the nondebtor(s) arise out of the same facts and are "essentially the same exact cases."[167] This prong is similar to the interests in the third prong of the Fourth Circuit's test and the last prong of the Ninth Circuit's dictum.

Second, the test properly requires that a nondebtor contribute substantial funds to the reorganization in consideration for the

165. *In re* Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002). See *supra* note 118 for the exact language the court used to set forth the seven factors.

166. *Id.*

167. *In re* Dow Corning Corp., 113 F.3d 565, 570 (6th Cir. 1997).

release of claims.[168] Requiring consideration from nondebtors removes the possibility of a debtor receiving a release without contributing to the reorganization plan. This prevents the Ninth Circuit's fear that a bankruptcy court's power to enjoin claims against third parties would be used for purposes other than to facilitate bankruptcy proceedings. The Sixth Circuit astutely followed the bankruptcy court in requiring that a nondebtor benefiting from a release give money to the reorganization of the debtor as consideration for that release.[169]

Third, the test follows the Second, Fourth, and Ninth Circuits' tests that mandate the injunction be "essential" to the reorganization.[170] This facror examines whether, in the absence of a release, the debtor's estate would be adversely affected or the reorganization plan would fail. This factor is not simply a generalized version of the first prong. Anytime there is an identity of interests and there are claims pending against both the debtor and the nondebtor, there may be a situation when an injunction is warranted. However, the injunction may not be essential because it may not affect the reorganization plan. The inclusion of this factor is therefore necessary to allow an injunction only when the reorganization would be adversely affected without it.

Fourth, the test demands that the reorganization plan be overwhelmingly accepted by the affected classes.[171] This factor allows the voting creditors to decide the necessity of the proposed release provisions in the reorganization plan. It also acts to prevent a bankruptcy court from unilaterally affecting an injunction of claims. This is further assurance that the affected claims will not be extinguished unless it is agreed upon by the voting creditors.

Fifth, the plan must provide a mechanism ro pay the affected parties for the release of their claims.[172] This factor serves to ensure that a release, although extinguishing a claim, would be accompanied by some form of compensation.

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168. *Dow Corning Corp.*, 280 F.3d at 658.

169. *Id.*; *In re* Heron, Burchette, Ruckert & Rothwell, 148 B.R. 660, 687 (Bankr. D.C. 1992).

170. *Dow Corning Corp.*, 280 F.3d at 658; *see In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285 (2d Cir. 1992); *In re* A.H. Robins Co., 880 F.2d 694 (4th Cir. 1989); *In re* Am. Hardwoods, Inc., 885 F.2d 621, 625 (9th Cir. 1989).

171. *Dow Corning* Corp., 280 F.3d at 658.

172. *Id.*

Sixth, the test requires a determination as to whether the reorganization plan will pay all claimants in full who elect not to settle.[173] The district court examined this prong on remand and noted that the Sixth Circuit did not require that full payment be guaranteed.[174] Essentially, this factor requires that the bankruptcy court find that the nonsettling claimants receive adequate compensation.[175] This follows the second prong of the Fourth Circuit test and further ensures that creditors will receive sufficient compensation under the reorganization plan.

The seventh factor in the test simply requires that the other factors be found by factual determinations in the bankruptcy court.[176]

E. Dow Corning's *Unusual Circumstances Test is the Right Way to Handle Future Mass Tort and Complex Litigation in Bankruptcy*

The Sixth Circuit correctly determined that the bankruptcy court had power to enjoin claims in *Dow Corning*. This decision was mandated by the facts of the case.[177] There were hundreds of thousands of claims pending against the debtor and over 14,000 claims against nondebtor parties sharing the same facts.[178] Without the financial contributions of the nondebtors to the reorganization, there would have been a substantial decrease in assets available to satisfy creditors.[179] Without the injunction provision, the

173. *Id.*

174. *In re* Dow Corning Corp., No. 95-20512, slip op. at 25, 28 (E.D. Mich. Dec. 11, 2002), *available at* http://www.mied.uscourts.gov/_dow/orders/orderpdf/DCCDismiss Consolodiate.pdf.

175. *Id.* at 32–34.

176. *Dow Corning Corp.*, 280 F.3d at 658.

177. *In re* Dow Corning Corp., 255 B.R. 445, 481 (Bankr. E.D. Mich. 2000) ("There is no dispute that this case 'is one of the world's largest mass tort litigations, and the threatened consequences of the thousands of product liability claims arising from its manufacture and sale of silicone breast implants and silicone gel, [is the reason] Dow Corning filed a petition for reorganization . . . .'" (quoting *In re* Dow Corning Corp., 86 F.3d 483, 485 (6th Cir. 1996))).

178. *Dow Corning Corp.*, 255 B.R. at 463 ("To date, there are approximately 14,795 breast implant cases against Dow Chemical and Corning, Inc. filed before this Court.").

179. *Dow Corning Corp.*, 86 F.3d at 494. The court explained,

> The potential for Dow Corning's being held liable to the non-debtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy. Claims for indemnification and contribution, whether asserted against or by Dow Corning, obviously would affect the size of the

reorganization settlement was destined to fail because of the indemnification and contribution claims.[180] Without the injunction, the reorganization could not proceed and the intolerable delay would increase costs of litigation by postponing satisfaction to the creditors and finality to the litigation. *Dow Corning* therefore required that a bankruptcy court have the power to enjoin claims against nondebtors.

Mass tort and large complex litigation may inevitably be resolved in a bankruptcy court.[181] A bankruptcy court is uniquely qualified to reorganize debtors, satisfy creditors, and bring finality to litigation that would otherwise require additional years to resolve without as much satisfaction to the creditors' claims. The circuits that first recognized a bankruptcy court's power to enjoin claims required that power as a mechanism to resolve asbestos and mass product liability claims.[182] However, the circuits that do not recognize a bankruptcy court's ability to enjoin claims in favor of nondebtors were not trying to resolve large or complex mass litigation.[183] Mass litigation and mass tort claims may therefore mandate the use of third-party permanent injunctions to fulfill the policies of bankruptcy courts. Essentially, *In re Dow Corning* required the Sixth Circuit to apply the same strong medicine.

V. CONCLUSION

A bankruptcy court has considerable power to enjoin claims against nondebtor parties to effectuate successful reorganization plans for the debtor. Although the Code does not specifically authorize the enjoining of claims against nondebtor parties, the Code does grant broad equitable powers under § 105(a) that are not

> estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization.

Id.

180. *In re* Dow Corning Corp., No. 95-20512, slip op. at 19–20, 29 (E.D. Mich. Dec. 11, 2002), *available at* http://www.mied.uscourts.gov/_dow/orders/orderpdf/DCCDismiss Consolodiate.pdf.

181. *See* Crabbe, *supra* note 121; Douglas G. Smith, *The Role of the Courts in Shaping American Bankruptcy Law: Review of Debt's Dominion—A History of Bankruptcy Law in America*, 33 SETON HALL L. REV. 109, 123–24 (2002).

182. *In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285 (2d Cir. 1992); *In re* A.H. Robins Co., 880 F.2d 694 (4th Cir. 1989).

183. *In re* W. Real Estate Fund, Inc., 922 F.2d 592 (10th Cir. 1990); *In re* Am. Hardwoods, Inc., 885 F.2d 621 (9th Cir. 1989).

limited by § 524(e). This grant of power is not boundless; it requires unusual circumstances to issue a permanent injunction in favor of nondebtor parties. As in *Dow Corning*, a bankruptcy court's ability to enjoin creditor claims against nondebtor third parties may be necessary to resolve future mass tort and complex litigation.

Jason J. Jardine[184]

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